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In the Supreme Court for the United States

OCTOBER TERM, 1970

No. 957

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

THE PULLMAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion on rehearing (A. 67-71) and the original opinion of the court of appeals (A. 56-66) are reported at 430 F.2d 49. The order of the district court (A. 12-14) is not officially reported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on July 30, 1970 (A. 73). On Oc-

tober 27, 1970, Mr. Justice White extended the time for filing a petition for a writ of certiorari to November 12, 1970. The petition was filed on November 10, 1970, and was granted on February 22, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under Section 706(b) of Title VII of the Civil Rights Act of 1964, "no charge" of discrimination "may be filed" with the United States Equal Employment Opportunity Commission until it has been filed with a state agency empowered to seek relief from employment discrimination, if one exists, and 60 days have expired or the state agency has terminated its jurisdiction, whichever is earlier. Section 706(d) requires that the charge be filed with the Commission within 30 days of receipt of notice that state proceedings have been terminated. If EEOC is unable to resolve the charge by conciliation, Title VII authorizes the private party to file suit.

The question presented is whether the district court was without jurisdiction to entertain the present suit alleging a violation of Title VII because the Commission, after having received a written charge from the complainant, referred it to the appropriate state fair employment practices commission, waited until that agency had terminated its jurisdiction, and then assumed jurisdiction of the original charge without having obtained an additional written charge or authorization from the complainant during the 30 days following termination of the state proceedings.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964 and regulations of the Equal Employment Opportunity Commission are set forth in Appendix A to this Brief (Br. App. A), *infra*, pp. 32-38.

STATEMENT

This suit was brought by Earl Love (petitioner in No. 6018, consolidated in this Court with the present case), a black man, against respondent Pullman Company, under Title VII of the Civil Rights Act of 1964, alleging that respondent had discriminated against him because of his race. The district court dismissed the suit, ruling that it was without jurisdiction because petitioner Love had not complied with the applicable procedural requirements and time limits of the Act. The court of appeals affirmed, Judge Fahy dissenting.

The Statutory Framework

Congress established a relatively complex procedural framework for implementation of Title VII's substantive goal of eliminating discrimination in employment on the basis of race, color, religion, sex, or national origin. The procedural provisions, particularly the series of time limits for various stages in the process of implementation, reflect a preference for voluntary settlement of claims of discrimination, primarily through the efforts of the Equal Employment Opportunity Commission and appropriate state and

local fair employment practices agencies. They also provide the aggrieved individual a prompt opportunity for judicial determination of his complaint.

The basic procedure is set forth in Section 706 of the Act, 42 U.S.C. 2000e-5, App. A, pp. 32-35. Section 706(a) establishes the Commission's authority to investigate charges filed by an aggrieved individual or a Commission member and, upon finding "reasonable cause to believe that the charge is true * * * [to] endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."

Section 706(d) requires that a charge be filed with the Commission "within ninety days after the alleged unlawful employment practice occurred" except in situations where there is a state or local agency authorized "to grant or seek relief from * * * or * * * institute criminal proceedings with respect" to discriminatory employment practices (Section 706(b)). In such cases, Section 706(b) requires that the non-federal agency have an initial opportunity to remedy alleged discrimination, and provides that no charge may be filed with the Commission "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." [1]

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[1] Proceedings are "deemed to have been commenced" by Section 706(b) when "a written and signed statement of the facts upon which the proceeding is based * * * is sent by registered mail to the appropriate State or local authority."

In cases, such as this one, where complaints have been filed by individuals with the Commission before proceedings have been commenced under state or local law, the Commission has, by regulation, adopted the procedure of referring complaints to the appropriate state agency and subsequently assuming jurisdiction of them. See *infra*, pp. 13-15.[2] Where non-federal proceedings take place, Section 706(d) requires that the charge be filed with the Commission "within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings * * * whichever is earlier."

Section 706(e) allows the Commission 30 days (which may be extended by the Commission to 60 days) from the time a charge is filed to secure voluntary compliance. If the Commission is unable to obtain compliance, it must notify the person aggrieved, who may bring suit within 30 days.[3]

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[2] In the case of a charge filed by a member of the Commission under Section 706(e), the Commission is required by Section 706(c) to notify the appropriate state agency and afford it a "reasonable time," if it so requests, to consider the matter before the Commission takes any action. The statute makes no reference, however, to the procedure to be employed with respect to individual complaints filed initially with the Commission.

[3] The Commission is not empowered to issue cease and desist orders or to initiate enforcement suits. The Attorney General's enforcement authority is limited to initiating suits against persons engaged in a "pattern or practice of resistance to the full enjoyment" of Title VII rights (Section 707, 42 U.S.C. 2000e-6) and intervention in private actions "of * * *

It has, accordingly, been argued by advocates of a rigid application of the various time limits that the maximum time which may elapse between the date of the discriminatory conduct and the filing of suit is either 300 days, where there is an appropriate state or local agency (150 days to complain to the agency; 60 days for agency consideration; 60 days for EEOC efforts; 30 days to file suit) or 180 days, where there is no such agency (90 days to complain to EEOC; 60 days for EEOC efforts; 30 days to file suit).

The Proceedings Below

Petitioner Love, who was employed by respondent for more than 42 years, filed a written charge of racial discrimination with the Colorado Civil Rights Commission in 1963 (A. 34). He alleged that he was performing the duties of a conductor under the job title of porter-in-charge, an all-Negro classification, and that he had not been promoted to the higher paying position of conductor because it was restricted to whites (A. 2-4). Apparently, no action was taken by the Colorado Commission at that time. Petitioner Love renewed his complaint orally to the same office in 1965 (A. 37-38). By letter of July 30, 1965, the Colorado Commission advised him of the possibility of a position as a conductor, but without seniority, and offered to "pursue the case to an end" if he desired (A. 48). Mr. Love rejected this possibility because of the lack of job security which would result from loss of his seniority (A. 39-40).

[great] public importance" (Section 706(e), 42 U.S.C. 2000e-5(e), Br. App. A. pp. 34-35).

Mr. Love wrote to the Equal Employment Opportunity Commission on May 19, 1966, again alleging that he was being denied the higher pay and other benefits of a conductor because of his race.[4] The EEOC—following its standard practice of referring complaints initially filed with it to appropriate state agencies for consideration—informed the Colorado Commission that the charges were apparently within the latter's jurisdiction. On June 1, 1966, the Colorado Commission, by letter, declined to assume jurisdiction, specifically waived the 60-day requirement of Section 706(b) (Br. App. A, p. 33), and asked the EEOC to proceed (A. 8). EEOC then assumed jurisdiction of the complaint without further communication with Mr. Love. When the Commission began its investigation by interviewing Mr. Love, he signed, on July 23, 1966, a formal charge on the standard EEOC form (A. 10-11).

The Commission subsequently found reasonable cause to believe that there was a violation of the Act (A. 49-51). Its efforts at conciliation were not successful, however, and it advised Mr. Love on May 3, 1968, that he had 30 days within which to bring suit (A. 4). He filed suit on May 28, 1968 (A. 1).

The district court granted respondent's motion to dismiss (which it treated as a motion for summary judgment) on the ground that Mr. Love had allowed the statute of limitations to run, by not filing the complaint with the EEOC within 30 days of July 30, 1965, the date of the letter from the Colorado Com-

[4] The letter, dated May 19, 1966, and received May 23, 1966, is reprinted in Appendix B to this Brief, *infra*, p. 39.

mission to him (A. 12-14).[5] The court of appeals, Judge Fahy dissenting, affirmed, adding as a separate ground for the district court's lack of jurisdiction the complainant's failure to comply with the procedural requirements of Section 706 in connection with new proceedings purportedly initiated in May 1966 (A. 56-62).

Mr. Love moved for a rehearing and rehearing *en banc*. The United States and EEOC intervened in support of the motion. The petition for rehearing *en banc* was denied, and the petition for rehearing was referred to the original panel. It held that its original decision was erroneous insofar as it rested on the failure of Mr. Love to file the complaint with the EEOC within 30 days of the state commission's letter of July 30, 1965, since the discrimination there complained of took place prior to the effective date of Title VII (July 2, 1965) (A. 69). The court, however, reaffirmed its decision on the second ground, with Judge Fahy again dissenting (A. 71). Thus, the Court's ultimate conclusions were that Mr. Love's letter, received May 23, 1966, could not serve as a complaint to EEOC, because he had not complained first to the state commission of alleged discrimination subsequent to the effective date of Title VII, and that EEOC could not obtain jurisdiction over the complaint, under its referral policy, on or after June 1 when that commission declined jurisdiction, at least

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[5] The court also ruled that the issue of injunctive relief, although not the issue of back pay, was moot because petitioner Love had resigned from the company in November 1968 (A. 59).

in the absence of "further word or act by the complainant" (A. 70).[6] While the court did not discuss the formal charge filed by Mr. Love with EEOC on July 23, 1966, more than 30 days after the state commission had declined jurisdiction, it apparently considered his failure to file this charge within 30 days to be jurisdictional, even as to discrimination of a continuing character. The court thus held that petitioner Love's charges to the Commission were filed both too early and too late, and that neither of them was timely.

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Commission sought, in this case, to accommodate two significant objectives of Title VII of the Civil Rights Act of 1964 by use of its referral policy. Title VII requires that non-federal agencies empowered to grant or seek relief from employment discrimination have an initial opportunity to remedy discrimination before action is taken by the Commission or the federal courts. But the statute also places the responsibility for securing ultimate compulsory compliance with Title VII guarantees—after non-federal agencies and the Commission have had the opportunity to obtain voluntary compliance—upon the individual by means of suits in the federal courts. By advising the Colorado agency of the complaint in this case, the Commission pro-

[6] The court stated that the EEOC's regulations at that time "did not contemplate or permit such a manipulation of the filing date," and that in any event such a filing procedure could not "be regularized by the adoption of regulations" (A. 70).

vided that agency with the first opportunity to remedy the alleged discrimination. At the same time, by automatically assuming jurisdiction of the complaint upon the state agency's termination of its consideration of the matter, the Commission made certain that petitioner Love retained his rights to its services and to bring federal court action.

In ruling that the Commission could not obtain jurisdiction over the complaint by this referral procedure and, hence, that the federal courts also lacked jurisdiction, the court of appeals, we submit, erroneously rejected the Commission's considered interpretation of the statute's procedural provisions and, instead, required inappropriately rigid adherence to complex timing requirements. Complaints frequently are filed initially with the Commission, but Title VII is silent on the manner in which it should deal with them. The statute does, however, empower the Commission to establish procedures to effect its purposes. The Commission, accordingly, has consistently employed its referral procedure in order to preserve the individual's right to federal protection of his Title VII rights, while fully honoring the right under the statute of non-federal agencies first to attempt to remedy employment discrimination.

In contrast to the Commission's approach, the court of appeals' formalistic ruling is not necessary to implement any policy of Title VII. To the contrary, it could very well discourage the intended beneficiaries of Title VII—who may believe EEOC is deliberately stalling by turning them away temporarily or who may be confused by the required procedures—from

persisting in seeking vindication of their rights. Nor is the decision below necessary to enable persons charged with discrimination properly to defend against the charge or otherwise to protect their valid interests. Indeed, respondent here, who was aware of petitioner Love's complaints of continuing discrimination at least by 1965, makes no contention that it was prejudiced.

The court's ruling essentially conflicts with the decision of the only other court of appeals which has considered the validity of the Commission's referral procedure, as well as with the approach of most federal courts to purely technical procedural irregularities in seeking relief under Title VII. Those courts have, like the Commission, generally applied a functional approach to the procedure under the statute, seeking to insure that its various policies are met rather than exalting procedural technicalities for their own sake. This approach is particularly appropriate under Title VII which is designed to enable lay working men and women, often unlettered and uncounselled, to secure critical rights against employment discrimination.

Moreover, even if it were assumed that the Commission's referral policy is invalid or was invalidly applied in this case, we believe that petitioner Love should nevertheless have been afforded his congressionally granted opportunity for judicial redress. He made good faith efforts to assert his Title VII rights and to have them judicially determined. In comparable situations in which individual complainants have inadventently failed to follow the strict letter of

Title VII's procedural complexities, the courts have ruled that their good faith efforts justify excusing those errors and affording them the full opportunity to invoke their rights, at least where there has been no prejudice to the responding party. This approach is especially appropriate here where, under the court of appeals' view, it is primarily the Commission's method of handling his complaint and not merely the complainant's own error which deprived him of a determination of his claim on the merits.

ARGUMENT

I. The Equal Employment Opportunity Commission Properly Exercised Jurisdiction of Petitioner Love's Complaints.

A. *The Commission's Referral Policy, Under Which It Asserted Jurisdiction, Validly Implements Congressional Objectives Of Providing State And Local Agencies An Initial Opportunity To Remedy Discrimination And Protecting The Individual's Right To Pursue Federal Remedies.*

The court of appeals ruled that the Commission could not obtain jurisdiction of petitioner Love's case by means of its referral policy. Under that policy, the Commission refers complaints filed initially with it to appropriate non-federal agencies and then assumes jurisdiction over them at the expiration of the statutory period during which these bodies have the exclusive opportunity to cure alleged discrimination. When the Commission begins its investigation of a complaint, usually by interviewing the charging party, it obtains a formal, sworn charge from him, as it

did here on July 23, 1966, if one has not already been filed. The court below also ruled that expiration of the 30-day time limit during which an individual must complain to the Commission after state or local proceedings have terminated barred EEOC from jurisdiction to entertain this formal complaint.

In thus rejecting the Commission's referral policy, the court of appeals adopted an unduly rigid approach to the procedural requirements of Title VII. The referral policy effectively implements two important goals of Title VII—providing state and local agencies with an initial opportunity to remedy discrimination and protecting the individual's right to pursue federal remedies, ultimately in court—without prejudicing defendants or interfering with any purpose of the statute.

1. The Commission's referral policy was developed in response to the recurrent problem of the treatment of complaints filed initially with it rather than the appropriate state or local agency.[7] Congress did not address itself to the problem of the disposition of such charges. It plainly desired that non-federal bodies

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[7] There are presently state fair employment agencies in at least 30 states, including California, New York, Ohio and Illinois. The Commission estimates that approximately 25 percent of all charges filed with it by complainants in those states have not been initially presented to the appropriate agency. Section 711, 42 U.S.C. 2000e-10, requires employers, employment agencies and labor organizations to post, in a conspicuous place, notices (which are prepared by the Commission) regarding filing of complaints. The notice (29 C.F.R. 1601.27) gives the address of the Commission and may prompt some individuals to complain initially to it.

have "primary, exclusive jurisdiction * * * for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (Senator Dirksen).[8] But Congress gave no indication—in the statute or in the legislative history—that it believed it was necessary or desirable that the individual personally present the charge to the appropriate state or local body.

The Commission, in exercise of its power to promulgate "suitable procedural regulations to carry out the provisions" of Title VII (Section 713(a), 42 U.S.C. 2000e-12(a)), has consistently referred premature charges to the appropriate non-federal agency. The pertinent Commission regulation which was in effect at the time of Mr. Love's complaints provided simply that it would "not accept the charge for filing, but shall assist the aggrieved person in complying with Section 706(b)" (Br. App. A, p. 38). In practice, the Commission implemented this regulation by referring charges to the appropriate state agency and, upon termination of their proceedings or after 60 days, us-

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[8] The original bill, which passed the House of Representatives, contained no provision comparable to Section 706(b) requiring first resort to state and local agencies. This requirement was first added in the Senate as one of the Dirksen-Mansfield amendments during a filibuster to attract enough votes for cloture. See, generally, Vass, *Title VII: Legislative History*, 7 B.C. Ind. & Comm. L. Rev. 431.

The original, as well as the final, bill did contain a provision authorizing the Commission to make agreements with state and local agencies, granting them exclusive jurisdiction where the Commission found their enforcement power to be adequate. Section 709(b), 42 U.S.C. 2000e-8(b). No such agreements have as yet been made.

ually—but not always—communicated with the charging party to determine whether he still wished to pursue his federal remedies. CCH *Employment Practices Guide*, ¶ 1254.15.

In 1968, the current regulation, which specifies the procedure in greater detail, was adopted. This regulation provides that the Commission will refer any charge filed initially with it to the appropriate state or local agency; that it will notify the complainant of this action; and that it will advise him that, unless it hears from him to the contrary, it will automatically assume jurisdiction of the complaint after 60 days have elapsed or upon termination of state proceedings, whichever occurs first (29 C.F.R. 1601.12, Br. App. A, pp. 34-38).[9]

2. The Commission's consistent practice of referring complaints filed initially with it to the appropriate non-federal agency satisfies the congressional policy that these agencies have the initial opportunity to resolve complaints. The court of appeals apparently believed that the referral procedure would, in some way, impair efforts by non-federal agencies (see A. 61), but there is no sound basis for believing that the

[9] Subsequent to the court of appeals' decision in this case, the Commission revised its practice (although not its regulation) regarding assumption of jurisdiction in order to afford further assurance that individuals will not lose their opportunity ultimately to seek judicial enforcement of their federal rights. Accordingly, pending resolution of the issue by this Court, the Commission now communicates with individuals who have complained initially to it, during the pertinent statutory period after referral to the appropriate non-federal agency, to confirm that they still wish the Commission to assert jurisdiction over their complaints.

efforts of non-federal agencies will be less vigorous or successful if complaints are referred to them by EEOC rather than filed initially with them by the individual.[10] And the record in this case does not suggest that efforts by the Colorado Commission were impaired by EEOC's referral.[11]

The referral procedure provides important protection to the individual's right to obtain judicial relief. The individual complainant's right of access to the courts is critical because the Act imposed upon him the burden of securing enforcement of Title VII by means of private lawsuit. See *Hutchings* v. *United States Industries*, 428 F. 2d 303 (C.A. 5); *Fekete* v. *U. S. Steel Corp.*, 424 F. 2d 331 (C.A. 3).[12]

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[10] Assumption of jurisdiction by the Commission, immediately subsequent to the expiration of 60 days, might, in some cases, afford state or local agencies a shorter period of exclusive jurisdiction because the complainant might not have filed immediately with EEOC at the end of the period. As a practical matter, however, the non-federal agencies usually have considerably longer than the minimum 60 days before federal efforts actually begin. And, of course, EEOC's assumption of jurisdiction does not prevent non-federal agencies from continuing their efforts.

[11] The Colorado Commission had twice previously received complaints from Mr. Love and twice failed to achieve a satisfactory resolution of the charge (see *supra*, p. 6).

[12] The history of revisions of Title VII during the course of congressional consideration of the Civil Rights Act of 1964 clearly indicates that Congress relied on private court action as the principal means of compelling compliance with the Act. Various versions of the bill consistently provided for means to compel compliance with Title VII in addition to procedures for conciliation of complaints. The original Senate version provided for a quasi-judicial board, comparable

The alternative to the referral procedure would be for the Commission, when a complaint is filed initially with it, to inform the individual that, in order to preserve his federal rights, he must first complain to the appropriate non-federal body and subsequently return to the Commission at the proper time—no earlier than 60 days from the time of complaint to the non-federal agency, (unless it earlier terminated jurisdiction), and no later than 30 days from notice of termination of that agency's proceedings or 210 days from the occurrence of the alleged discrimination (whichever is earlier). But this alternative would, in our view, be less likely to insure the individual of ultimate access to the courts. Some complainants, confused by the relatively complex procedural intricacies of Section 706, might fail to comply with such a requirement while others, feeling that the requirement of initial complaint elsewhere is simply the "run around," might abandon further attempts to secure their rights. See Note, *A Look at Love* v. *Pullman*, 37 U. Chi L. Rev. 181, 188. Both possibilities are especially serious because the intended beneficiaries of the Act are lay working men and women who are frequently unlettered or un-

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to the National Labor Relations Board, with power to issue broad remedial orders. The House version granted the Commission authority to institute civil suits in federal district court to compel compliance. The version which finally was passed placed the ultimate authority to compel compliance in the federal courts and reserved to the individual the main responsibility to initiate suits. See *Dewey* v. *Reynolds Metals Company*, No. 835, O.T. 1970, Brief for the United States as Amicus Curiae, p. 23 n. 9; Note, *Developments In The Law—Employment Discrimination And Title VII Of The Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1196-1197.

counselled and may in many cases have been the victims of indifferent governmental bureaucracies. A more active role by EEOC in assisting complainants is therefore desirable and appropriate to assure achievement of the congressional objective.

3. The referral procedure represents the considered judgment of the agency responsible for interpretation of the statute, which "is entitled to great deference." *Griggs* v. *Duke Power Co.*, No. 124, October Term, 1970, decided March 8, 1971, slip op. at 9; *Udall* v. *Tallman*, 380 U.S. 1. Indeed, we believe this principle applies with special force where, as here, an agency charged with the administration of a procedurally complex statute has, on the basis of its experience, accommodated its own procedures to the needs of the Act's intended beneficiaries in order to assure that form will not be exalted over substance in implementing the Act's policies.

The Commission's referral procedure has, accordingly, been approved by the only other court of appeals which has specifically considered its validity. *International Brotherhood of Electrical Workers, Local 5* v. *Equal Employment Opportunity Commission*, 398 F. 2d 248 (C.A. 3), certiorari denied, 393 U.S. 1021. See, also, *Marquez* v. *Sales Office, Ford Motor Co.*, 2 FEP Cases 26 (D. Neb.), affirmed, 3 FEP Cases 275 (C.A. 8); *Fix* v. *Swinerton and Walberg Co.*, 3 FEP Cases 9 (D. Colo.).[13] In *IBEW, Local 5*,

[13] In *Equal Employment Opportunity Commission* v. *Union Bank*, 408 F. 2d 867 (C.A. 9), the court ruled that the Commission had no jurisdiction over a complaint which the individual had not previously filed with the appropriate state

as in the present case, the complainant wrote initially to the Commission and it referred the complaint to the appropriate state agency. After the sixty-day deferral period, the Commission wrote the complainant inquiring whether he wished it to assert jurisdiction. He replied affirmatively. At that time, the state commission had not terminated its proceedings and 210 days had not passed since the date of the alleged discrimination. The state agency did terminate its jurisdiction a month later. When EEOC subsequently commenced its investigation—more than a year from the date of the alleged discrimination—the complainant finally swore a formal charge.[14] In upholding the Commission's action, the court held that the initial letter to the Commission "was not * * * a valid charge when received * * * for it had not been sent to * * * [the state commission] and the required 60 days had not passed." 398 F. 2d at 252. But it ruled that "when * * * [complainant's] answer to EEOC's letter * * * was

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agency. The state agency in that case, however, had no opportunity to consider the charge for the Commission did not refer it. Accordingly, the issue of the validity of the Commission's referral procedure was not before the court.

[14] The exact timing in *IBEW, Local 5* was: discrimination (July 21, 1965); letter to EEOC (August 12, 1965); referral to state commission (September 3, 1965); letter from EEOC to complainant inquiring whether he still desired it to assume jurisdiction (December 16, 1965); reply by complainant authorizing assumption of jurisdiction (December 27, 1965); advice by the state agency to complainant that it had terminated its jurisdiction (January 28, 1966); formal charge filed (August 17, 1966). 398 F. 2d at 249-250. When the formal charge was filed, an attempt was made to serve it personally on the Union. A copy of the charge was received by mail on December 14, 1966. *Id.* at 250.

received * * * [the] charge * * * became an effective charge as of" the date of receipt, which was "within the two hundred and ten day limit." *Ibid.*

The court below distinguished the present case from *IBEW, Local 5* on the ground that the court there "found a subsequent charge filed within the statutory time intervals and sequence was valid" (A. 60-61).[15] It is not clear from the court's opinions in the present case whether it intended to suggest that it would hold the referral procedure valid if, during the pertinent time period, EEOC obtained a reauthorization from the complainant to proceed (see A. 70). If that limited ruling is, in fact, the basis of the court's decision, it truly is a meaningless "exaltation of form over substance." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1214.

Formal reauthorizations from complainants within the designated time period are without practical significance. With or without this additional step, Commission proceedings would follow essentially the same pattern. When the Commission reaches a case, it typically interviews the complainant as the first step

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[15] In the present case, the formal complaint of July 23 was filed within the 210-day period from the act of discrimination (which was continuing and, for purposes of timing, extended through May 22). Section 706(d) requires filing a charge with EEOC within 210 days of the alleged discrimination or within 30 days of notice that state proceedings have been terminated. The court of appeals ruled that the 30-day period from termination of state proceedings was the relevant time period in this case even though petitioner Love evidently had not, himself, received such notice. EEOC, of course, did receive such notice.

in its investigation. If, at that time, interim developments have made Commission efforts no longer desired or necessary, proceedings can then be terminated. The party charged with discrimination ordinarily is not served with a copy of the complaint to the Commission until after that interview.[16] In the present case, respondent, who was, of course, aware of petitioner Love's earlier charges of racial discrimination, was served with a copy of the formal complaint on July 27, 1966 (A. 54), four days after it was sworn. Moreover, further inquiry of the complainant after the State had terminated its proceedings here would have been a senseless formality. His letter of charges to the Commission had been received on May 23, 1966, only eight days before it assumed jurisdiction, in response to the State's waiver, on June 1, 1966.

A requirement that the Commission obtain a reauthorization will not, moreover, simply add a useless piece of paper to its file. It may very well cause the complainant to lose his opportunity for EEOC conciliation and subsequent court action, either as a

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[16] Although a regulation of the Commission which became effective on July 29, 1966 (after the present complaint was served) provides for service of the charge upon its filing (29 C.F.R. 1601.13), the Commission's practice, until it is able to eliminate its sizeable backlog, has been not to serve the alleged discriminator with a copy of the charge until it actually begins its investigation because it fears that reprisals against the charging party may occur between the time of his complaint and the time the Commission begins active proceedings. See *IBEW, Local 5, supra,* p. 19. Of course, no issue with respect to service of the charge has at any time been raised by the respondent in the present case.

result of failure on his part to reply to a letter from EEOC in time or because the Commission inadvertently failed to send a request at the proper time. An individual's access to forums designated for the vindication of significant federal rights should not be denied as a result of such harmless oversights or accidents.

B. *The Commission's Exercise Of Jurisdiction Was Consistent With The Practical Approach Which The Commission And Most Federal Courts Have Adopted in Interpreting The Time Requirements Of Title VII.*

The Commission and the lower federal courts have generally sought, in interpreting the timing and other provisions of Title VII, to insure that the basic goals of the statute are met. They have refused to apply the procedural provisions with undue rigidity at the expense of those goals. The departure by the court below from this practical approach was, in our view, unwarranted.

The statute encourages efforts, primarily by EEOC and comparable non-federal agencies, to achieve voluntary compliance with the requirements of Title VII. It therefore requires that those bodies be given the opportunity, before judicial proceedings are begun, to attempt to settle disputes. The statute also affords the individual complainant an opportunity to seek prompt enforcement of his rights in the federal courts. Accordingly, it requires the individual to refrain from filing suit for only a comparatively short period during which efforts at conciliation may take place.

Strict adherence to the time schedule of the statute would in many instances impair, rather than promote, meaningful accommodation between voluntary and compulsory means of securing Title VII guarantees. Rigid enforcement of the various time limits might, for example, require the individual to complain to EEOC or to file suit even though it appears that preliminary voluntary efforts are likely to be successful and render further action unnecessary. And, of greater importance, such a mechanistic approach might deprive individuals, who are actively seeking redress of their grievances in good faith, of their opportunity for judicial relief because of technical irregularities which do not impair the ability of the party charged with discrimination to respond to the charge (but see Point II, *infra*).

A functional approach, on the one hand, permits the process to take an orderly and natural course, in keeping with the statutory policies. For example, the Commission has interpreted Section 706(e), providing for notice to a complainant of his right to sue if it has not obtained voluntary compliance within 60 days from the filing of a charge, to permit continuation of conciliation beyond this time without depriving the individual of his right to sue. The conciliation process often is not complete by the end of 60 days. If, at this time, the Commission must issue the notice of right to sue to the complainant, who, in turn, must institute any judicial action within 30 days, efforts at achieving voluntary compliance may be thwarted. Accordingly, the Commission has followed the practice, which the courts of appeals have

uniformly approved, of issuing the notice only at termination of its efforts with respect to the charge, unless the complainant specifically requests its issuance sooner. *Cunningham* v. *Litton Industries*, 413 F. 2d 887 (C.A. 9); see *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357 (C.A. 7).

The same attitude is reflected in cases suspending the running of the statutory period of limitations for initial complaint to the Commission in the situation where an individual has sought arbitration of his grievance under a collective bargaining agreement. *Culpepper* v. *Reynolds Metals*, 421 F. 2d 888 (C.A. 5); *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (C.A. 5). Congress made no reference to the effect of the individual's pursuit of arbitration on Title VII remedies.[17] The court in *Culpepper* ruled that the congressional purpose of encouraging efforts at non-judicial settlement of claims of discrimination is better served by suspending the statute upon the individual's "constructive effort" to obtain private relief by arbitration than by forcing him to file a complaint with the Commission or institute court action before arbitration is completed. The court relied upon *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, in which this Court held that the statute of limitations under the Federal Employers Liability Act was

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[17] Cf. *Dewey* v. *Reynolds Metals Co.*, No. 835, October Term, 1970, in which one of the issues is whether an individual may pursue his rights under the collective bargaining agreement by grievance-arbitration proceedings, as well as his rights under Title VII by proceedings in the federal courts, or whether he must elect between these rights.

tolled by the timely filing of an action in state court which subsequently was dismissed for improper venue. The *Culpepper* court stressed the same essential considerations which this Court emphasized in *Burnett*—that in applying "humane and remedial" legislation the interest in vindicating plaintiffs' rights frequently outweighs the policy of repose embodied in statutes of limitations (380 U.S. at 427; 421 F. 2d at 892) and that the complainant had not slept on his rights but had diligently sought relief and had provided timely notice of his claim to the defendant (380 U.S. at 429; 421 F. 2d at 891).[18]

The ruling of the court of appeals in the present case, by contrast, needlessly frustrates the basic statutory objective of affording the individual the ultimate opportunity to have the federal agency and the federal courts determine the validity of his claim that his federal rights were violated. The functional approach of the Commission protected this right without depriving non-federal agencies of their opportu-

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[18] Two district courts recently have ruled similarly that the Commission is not barred from considering complaints filed with it within 210 days from the date of discrimination in states with fair employment practice commissions. In these cases, complaints had not been filed with the appropriate state agency within 150 days of the discrimination. At the expiration of 210 days, the agencies had not yet terminated their proceedings or had jurisdiction of the case for 60 days. However, the Commission, under its regulations (29 C.F.R. 1601.12), accepted complaints for filing before the expiration of 210 days in order to preserve the individual's right of access to federal forums for the protection of his Title VII rights. See *Vigil* v. *American Tel. & Tel. Co.*, 305 F. Supp. 44 (D. Col.); *Anderson* v. *Methodist-Evangelical Hospital, Inc.*, 63 LC (CCH Transfer Binder) ¶ 9525 (W.D. Ky.).

nity to remedy discrimination or prejudicing the defendant. The court below, therefore, should have approved the Commission's exercise of jurisdiction over the complaint, either by permitting it to treat petitioner Love's initial letter of charges to the Commission as having been filed when the Colorado Civil Rights Commission subsequently declined jurisdiction or by treating the 30-day period as tolled to permit the filing of the subsequent complaint. See *Foman* v. *Davis*, 371 U.S. 178 (rejecting an unduly technical approach to the question of timeliness of notices of appeal under the Federal Rules of Civil Procedure).

II. An Individual Who Has Sought In Good Faith To Invoke His Title VII Rights Should Not Be Deprived Of Judicial Redress Because Of Technical Procedural Defects In Proceedings Prior To Suit.

Our fundamental position is that the Commission's referral procedure is a wise and proper exercise of its power to adopt regulations for the implementation of Title VII. But even if that procedure—as presently embodied in the regulation or as applied in this case—is not valid, we believe that complainants who have made reasonable efforts to invoke their Title VII rights should not be barred, as a result of application of the Commission's allegedly erroneous procedure, from the opportunity to seek enforcement of those rights in the federal courts.

The federal courts have repeatedly recognized the significance of the individual's right under Title VII to judicial enforcement of his federal rights. They have, for example, ruled consistently that the complainant may institute suit after his complaint has

been before the Commission for the required 60 days even if the Commission has not yet considered the complaint.[19] Similarly, the courts have ruled that the individual may sue even if the Commission has, after investigation of his complaint, determined that, in its view, no violation of Title VII has occurred.[20]

The courts have also recognized that a tolerant attitude toward procedural errors is particularly appropriate because of the nature of the intended beneficiaries of Title VII. As Judge Fahy, dissenting below, pointed out (quoting *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Calif.)) (A. 65):

> We are not dealing with businessmen plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class, who are generally without substantial higher education, dot every "i" and cross every "t" on their way to the courthouse.

Accordingly, the courts, in a variety of situations involving alleged defects in complying with the procedural requirements of Title VII, have "been ex-

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[19] See *Dent* v. *St. Louis-S.F. Ry.*, 406 F. 2d 399 (C.A. 5); *Johnson* v. *Seaboard Air Line R.R.*, 405 F. 2d 645, (C.A. 4), certiorari denied, 394 U.S. 918; *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357 (C.A. 7).

[20] See *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3); *Flowers* v. *Local No. 6, Laborers Int'l U. of North America*, 431 F. 2d 205 (C.A. 7); *Beverly* v. *Lone Star Lead Constr. Corp.*, 3 FEP Cases 74 (C.A. 5, No. 29,620, January 19, 1971).

tremely reluctant to allow procedural technicalities to bar claims brought under the Act." *Sanchez* v. *Standard Brands*, 431 F. 2d 455, 460 (C.A. 5). Thus, in addition to upholding the Commission's functional approach to the statute's timing requirements for filing charges of discrimination, they have applied a liberal approach to the pleadings themselves. The courts have held that failure to have the initial letter of complaint notarized does not bar suit even though the notarized charge is not filed until after the time limits have expired;[21] that if some charging parties have filed charges with EEOC, it is not necessary for other members of the same class to do so in order to obtain relief;[22] and that an incomplete or erroneous statement of charges filed with EEOC does not bar a later amendment.[23]

These cases have a common rationale. Where the complainant has made reasonable efforts, in good

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[21] *Choate* v. *Caterpiller Tractor Co.*, 402 F. 2d 357 (C.A. 7); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (C.A. 5).

[22] *Oatis* v. *Crown Zellerback*, 398 F. 2d 496 (C.A. 5).

[23] *Sanchez* v. *Standard Brands, Inc.*, 431 F. 2d 455 (C.A. 5); *Georgia Power Co.* v. *Equal Employment Opportunity Commission*, 412 F. 2d 462 (C.A. 5). The Commission's regulation on the contents of charges (29 C.F.R. 1601.11(b)) similarly provides that "a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date."

faith, to secure protection of his federal rights by the federal bodies responsible for protecting them and the defendant has not been prejudiced, the complainant should not be denied the opportunity for a determination of his charge on the merits because of procedural defects. See, also, *Burnett* v. *New York Central R. Co.*, 380 U.S. 424; *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (C.A. 5). This rationale plainly is applicable to this case. Petitioner Love made reasonable efforts to invoke the aid of the Commission and respondent's defense was not prejudiced. Indeed, it was the action of the Commission and not that of complainant which, under the court of appeals' ruling, deprived the complainant of his opportunity to invoke federal remedies. Had the Commission at some point advised Mr. Love that it could not process his charge until he had formally complained to the state commission, there is no reason to believe, in view of his past persistent efforts to obtain redress, that he would not have done so. Cf. *Crosslin* v. *Mountain States Tel. & Tel.*, No. 326, October Term, 1970, decided January 18, 1971.[24] The good faith error (if it was error)

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[24] *Crosslin* involved the Commission's practice of refusing to refer charges filed with it to certain state agencies whose enforcement powers it considered inadequate. The court of appeals ruled that the federal courts were without jurisdiction to consider petitioner's claim of racial discrimination because it had not been presented to the state agency. We took the position, in an *amicus* brief filed at the invitation of the Court, that petitioner should not be deprived of her opportunity for judicial relief by application of the Commission's policy. We suggested that the Court grant the petition for a writ of certiorari and order the case remanded to the district court with instructions to retain jurisdiction for a sufficient

of the Commission in applying its consistent procedural policy, no less than good faith non-prejudicial procedural mistakes of Title VII complainants, should not bar ultimate determination in the federal courts of the substantive merits of complaints of illegal employment discrimination.

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time to permit petitioner to institute appropriate state proceedings. *Brief For The United States As Amicus Curiae,* pp. 8-9. The Court granted the petition, vacated the judgment, and ordered the case remanded to the district court "for reconsideration in light of the suggestions contained" in our brief.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded for further proceedings in the district court.

Respectfully submitted.

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MAY 1971.

APPENDIX A

STATUTORY PROVISIONS AND REGULATIONS

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, provides:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commsision where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and conviction thereof shall be fined not

more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment pracitce alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect

thereto upon receiving notice thereof. the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission

shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

Section 713(a), 42 U.S.C. 2000e-12(a), provides:

> The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

The present regulation of the Equal Employment Opportunity Commission regarding referrals, 29 C.F.R. 1601.12, provides:

(a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.

(b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C.,

which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidenced by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

(v) In cases where the document is filed with the Commission more than 150 days following the alleged act of discrimination but less than 210 days therefrom, the case shall be deferred pursuant to procedures set forth above: *Provided, however*, That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 209th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceeding prior to the 209th day following the alleged acts of discrimination, without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

The regulation in effect at the time the charge in this case was lodged with the Equal Employment Opportunity Commission (30 Fed. Reg. 8408) provided:

> In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or from other information that the aggrieved person has not begun proceedings before a State or local authority pursuant to section 706(b) of Title VII, the Commission may not accept the charge for filing, but shall assist the aggrieved person in complying with Section 706 (b).

APPENDIX B

May 19, 1966

Equal Employment Opportunity
Commission
Washington, D. C. 20506

[Received May 23, 1966]

Attn: Mr. George L. Holland

Hentlemen: (sic)

This is a letter of inquiry to determine whether the circumstances I feel unfair and discriminatory are of such a nature as to come under your area of inquiry. I have taken the matter up with the state Civil Rights Commission locally and find that my objective was not understood. I am enclosing their letter of reply. According to it, they evidently believed I was endeavoring to become a Pullman Conductor. That is not the case.

I have been a sleeping-car porter for 40 years, and an "in-charge" porter for 20 of those years. My complaint is simply this: That when I am on duty as an "in-charge" porter I have all the duties and responsibilities of a Pullman conductor, and receive only porter pay.

I maintain that this is discrimination because of race, and I believe that it is a matter which comes under the jurisdiction of your office. If there is further information which you require I will be pleased to give it to you.

Very truly yours,

/s/ Earl A. Love
EARL A. LOVE
1511 East 29th Ave.
Denver, Colo. 80205

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